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C O N F I D E N T I A L SECTION 01 OF 03 TEL AVIV 003111

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TAGS: [PGOV](#) [PREL](#) [IS](#) [KPAL](#) [KWBG](#)
SUBJECT: CHIEF JUSTICE BEINISH ON SETTLEMENTS AND THE
SEPARATION BARRIER

REF: A. TEL AVIV 02715
[B](#). TEL AVIV 02630
[C](#). TEL AVIV 02670

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Classified By: Ambassador Richard H. Jones for reasons 1.4 (b), (d)

[1](#)1. (C) Summary: On October 23, The Ambassador met with Chief Justice Dorit Beinish to discuss the High Court of Justice's (HCJ) recent decision to uphold the GOI's retroactive approval of settlement construction in the Mattityahu East settlement, GOI implementation of the Court's rulings to reroute the separation barrier, and outpost evacuations. According to Beinish, in the case of construction in Mattityahu East, neither the legality of settlements nor the GOI's commitments to the USG on this issue was considered in deciding this case. The decision to legalize construction was made because demolition of some 1,900 completed or partially-completed housing units would be unfair to the innocent buyers, who were unaware of the developer's surreptitious actions. According to Beinish, the retroactive approval of town planning in Israel and the West Bank is "not unusual." Beinish argued that the Court's decision to move the barrier closer to Mattityahu East was more significant because coupled with the 2006 Zofim decision, these decisions set a precedent upholding the principle that the barrier cannot be routed to accommodate future settlement expansion. She noted that the Court does not take the politics which surround settlements into consideration. Instead, in deciding cases regarding the barrier, the Court applies principles that balance the Israelis' right to life -- regardless of their residence in settlements or Green Line Israel -- with Palestinian human rights. Beinish was hopeful that the GOI would implement the HCJ decisions to reroute the barrier in a "reasonable time." End summary.

Settlement Politics Not Factored in Court Decisions

[1](#)2. (C) Acknowledging that she did not sit on the panel that decided on September 5 to uphold the GOI's retroactive legalization of settlement construction in Mattityahu East, Chief Justice Beinish told the Ambassador that obtaining retroactive approval of town planning in Israel and the West Bank "happens" and is not "something rare." In the case of Mattityahu East, however, the Heftsiba construction company did not clarify ownership of the land before commencing construction on approximately 1,900 housing units. In response to the Ambassador's question on whether the Court

weighed the construction of what essentially would be a new settlement into its decision, Beinisch answered that this was not considered by the Court. Although she acknowledged that this construction was for a new settlement, she noted that it was not an ideological one. Demolishing some 1,900 completed or partially-completed housing units would be unfair to the innocent ultra-orthodox buyers, who represent one of the poorest sectors of Israeli society, and were unaware of Heftsiba's surreptitious actions that eventually led to the construction company's demise (refs a, b).

Principles Balance Security with Human Rights

13. (C) In Justice Beinisch's opinion, the Court's other decision to move the barrier closer to Mattityahu East (ref c) was a much more significant ruling. Taken with the Court's June 2006 decision to reroute the barrier near the settlement of Zofim (located in the northern West Bank), these decisions set a precedent upholding the principle that the barrier cannot be routed to accommodate future settlement expansion.

14. (C) Beinisch said that in cases regarding the barrier and settlements, the Court does not weigh questions regarding the legality of settlements in its decisions. The Court recognized that the GOI's obligation is to protect its citizens, regardless of whether they live in Green Line Israel or the West Bank. The Court additionally recognized the need to respect Palestinian human rights. Therefore, in cases regarding the route of the barrier, the Court must find the balance in protecting both the Israeli right to life and Palestinian human rights. "If people's lives are in danger, we must allow the barrier to save these lives," said Beinisch. She added, however, that the barrier must be "close to the settlements' houses." In response to the Ambassador's

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question on whether she meant existing housing units or housing that was planned, Beinisch answered that the houses must already be built.

15. (C) Although the GOI did not initially want to build a barrier, Prime Minister Sharon later approved its rapid construction to protect Israeli citizens from terror attacks originating from the West Bank, according to Beinisch. In 2002, the Court rejected a petition against the barrier's route near Zofim based on security needs. However, in June 2006, upon learning that the barrier's route in this area was routed to accommodate the building of a planned Israeli industrial zone, the Court ordered a 10-kilometer section to be moved closer to Zofim, thus returning about 250 acres to the adjacent Palestinian villages. Beinisch noted that the Court is not an investigative body and did not have all the details in 2002. However, upon learning that the barrier was designed to accommodate future settlement expansion, the Court re-tried the case and reversed its decision last year. She remarked that Palestinian land can only be expropriated for military, not political purposes. Beinisch commented that uniquely among other Supreme Courts, the HCJ spends much of its time in researching judgments looking at aerial photography. Its panels strive to assess the barrier's effect down to the level of its impact on each tree in a farmer's orchard.

Beinisch Hopeful on GOI Implementation of HCJ Rulings

16. (C) Highlighting that the USG is currently working with both the Israelis and the Palestinians to advance the peace process, the Ambassador stressed the important role the West Bank environment would play in building the momentum leading-up to and following the upcoming Annapolis conference. The Ambassador noted that it would be easier for

the GOI to carry-out confidence building measures that were in response to HCJ rulings than those that were seen merely as commitments to the USG or concessions to the Palestinians.

Noting that the HCJ was awaiting the GOI's implementation of four HCJ decisions to reroute segments of the barrier (near the settlements of Alfe Menashe, Zofim, Hashmona'im, and Mattityahu East), the Ambassador asked when Beinish foresaw the GOI undertaking these changes. Beinish answered that although the HCJ does not usually monitor implementation of its judgments, based on her prior experience she believed that the GOI would complete these changes within a "reasonable time" as stipulated by the Court. In response to the Ambassador's question on the definition of "reasonable," Beinish replied that the planning, budgeting, engineering and construction of a new route, and demolition of any stretch of fence already built on the old route would take time. Additionally, any new routing alternatives would have to go through the legal process again in order to hear any petitions against the proposed route. She thought, however, that a new route around Alfe Menashe had been recently approved (Note: Embassy will follow-up on this case and report septel. End note).

17. (C) Beinish assessed that the Court has completed approximately 100 of 130 existing petitions against the barrier's route. She noted that the big cases currently before the Court are the Ma'ale Adummim bubble and the barrier's route around Gush Etzion. A decision on Gush Etzion has been made, but is not yet published, according to Beinish. On Ma'ale Adummim, she said that a few months ago, the Court sent the barrier's planned route back to the Ministry of Defense (MOD) for reevaluation. Although the GOI's policy in the West Bank is based on security, she said that optimally, the GOI should also apply the Court's principles when considering routing amendments. According to the Court, the barrier should: be close to existing houses in settlements, not accommodate future settlement expansion, and avoid confiscating or trapping Palestinian agricultural land when possible. Beinish noted that the GOI applied the Court's principles to much of the barrier's route after the Court's 2004 decision on the Beit Surik case. In its judgment, the Court ruled that most of the route to which the Beit Surik petition related must be changed. (Note: Beit Surik is located north of Jerusalem. End note.). The Ambassador recalled that Defense Minister Barak had assured US officials recently that the MOD does not need to wait on the Court to stipulate barrier changes. Chief Justice Beinish welcomed this remark and stressed that the Court should be the last resort.

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Outpost Cases Pending

18. (C) In response the Ambassador's questions on outposts, Justice Beinish said she was hesitant to discuss cases that had yet to be decided. She affirmed that the Court had ordered the MOD to present it with a plan to evacuate the Migron outpost and noted that the Court would welcome an MOD plan that provided a comprehensive solution to the problem.

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JONES